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No. 91-88

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MALCOLM A. SUSSEL,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Ninth Circuit Court of Appeals erred in affirming the District Court's grant of the City and County of Honolulu's motion for summary judgment dismissing Petitioner's claim to a right of political belief and association under the First Amendment.

2. Whether or not the Ninth Circuit Court of Appeals erred in affirming the District Court's grant of the City and County of Honolulu's motion for summary judgment dismissing Petitioner's claim that he was denied due process under the Fourteenth Amendment.

3. Whether or not the Ninth Circuit Court of Appeals erred in affirming the District Court's grant of the City and County of Honolulu's motion for summary judgment dismissing Petitioner's civil rights claims under 42 U.S.C. § 1983.

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IN THE SUPREME COURT OF THE UNITED STATES
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MALCOLM A. SUSSEL,

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RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

I.

COUNTERSTATEMENT OF THE CASE

Respondent City and County of Honolulu (herein "City") disagrees with the statement of facts presented by the Petitioner in instances too numerous to point out individually within the space limitation of this brief. Therefore, categories of erroneous statements will be pointed out together with a counterstatement of the case.

Petitioner repeatedly erroneously characterizes the personnel action taken by the City with respect to himself as a "demotion" and thereafter builds specious legal arguments thereon.

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[1]The District Court's Order granting the City's motion to dismiss all the individual parties sued in their official capacities was not appealed by the Petitioner; however, the District Court did not dismiss the action against the individuals sued in their personal capacities. Therefore, counsel for the City represents the City only; the individual Respondents remain as parties in their personal capacities and are represented by separate counsel.

In the first five Questions Presented for Review, Petitioner frames the questions on the repeated erroneous assumption that the personnel action taken was a "demotion."

Moreover, in the first five of the Reasons for Granting the Writ set forth at pages 11 through 26 of the Petition, the arguments rest again on the repeated erroneous assumption that the personnel action was a "demotion."[2] As will be demonstrated below, the removal of this assumption causes the due process arguments of Petitioner to collapse and, as held by the District Court and affirmed by the Ninth Circuit, to be without merit.

Rather than a demotion, the Ninth Circuit found that,

> The dispute is not whether demotion is an interest protected by the due process clause but whether Sussel was demoted or merely downwardly reallocated.

Petitioner's Appendix A at p. 8a.

Petitioner also makes repeated reference in his Statement of the Case to his having been "replaced" in his position or "removed" from his position or to his "replacement" or "removal," all such words being conceptually consonant with the theory of demotion. Here, too, this repeated erroneous statement, once removed as a basis for his legal arguments, causes Petitioner's First Amendment argument likewise to be without merit.

Since the Ninth Circuit determined that the question was whether or not Sussel was demoted or downward reallocated, the question of whether or not he was ever replaced or removed never arose.

The difference between a "demotion" and a "downward reallocation" is legally significant.

Under the City's Civil Service Rules, a "demotion" is a personnel action involving the removal of an employee from a

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[2]Since Petitioner did not include Question 6 of the Questions Presented for Review among the reasons for the grant of certiorari, Respondents will not respond to Question 6 nor to Reasons for Granting the Writ numbered VI which is the counterpart to Question 6.

particular position and placing him in a lower position at a lesser pay. In a "downward reallocation," the employee remains in his particular position, but the duties of the position are redefined or reclassified to lesser ones, but at the same time the employee maintains his basic pay by way of temporary differential pay, a process known as "red circling." A demotion is considered a disciplinary action while a downward reallocation is not. The former process is protected by due process; the latter is not. *See* Ninth Circuit Opinion, Petitioner's Appendix A at p. 8a.

The relevant and material facts are as follows:

On January 2, 1985, the Respondent Mayor Frank F. Fasi ("Fasi") was sworn into office as Mayor of the City and County of Honolulu. Under the immediate prior Administration, the Petitioner ("Sussel") was appointed to the position of "Executive Assistant I, Position No. CD 300" in the City's Civil Defense Agency. Respondent City and County of Honolulu ("City") conceded that Sussel was a civil servant and that the position he occupied was in the City's Civil Service. Prior to Fasi being sworn into office as Mayor, Sussel publicly claimed in the local news media that Fasi intended to remove Sussel from his position and to replace him with a political appointee. Sussel had his government union attorney write a letter to Fasi in December 1984, before he took office as Mayor, advising Fasi that he was without power to remove Sussel from his civil service position.

On the day Fasi was sworn in, he appointed Respondent George Kekuna ("Kekuna") to a position in the office of the Managing Director, with the official title "Executive Assistant II," Position No. MD 134, and also referred to as "Deputy Director-Designate, Oahu Civil Defense Agency." Under the City Charter, the Managing Director is the principal management aide to the Mayor and is mandated to "[s]upervise the heads of all executive departments and agencies assigned to the managing director . . . ." Section 6-102(a) of the Revised Charter of the City & County of Honolulu 1973 (1984 Edition). Appendix A at p. 1a. This management supervision was carried out by the Managing Director through the use of executive assistants assigned to various departments and agencies of the City. It is uncontroverted that under the City Charter the City's

Civil Defense Agency, headed by a Civil Defense Administrator, is an executive agency subject to the Managing Director's supervision. In the prior Administration, pursuant to this authority in the Managing Director, Sussel was supervised by an executive assistant assigned to and holding a position in the Managing Director's office. After Fasi was sworn in, Sussel held the exact same position that he occupied before the Mayor's election. He continued to be supervised by the Managing Director's office through Kekuna who was an Executive Assistant in the Managing Director's office. Moreover, the Managing Director advised Sussel he would not be removed from his position. Sussel was never removed and, in fact, still occupies Position CD 300 but with redefined duties.

Sussel objected to the supervision by the Managing Director's office and refused to recognize Kekuna as the Managing Director's Executive Assistant. Sussel claimed that by virtue of such supervision, he had been stripped of his responsibilities but yet was left with liability in the event an injured third party made a legal claim against him for some alleged negligence by the Civil Defense Agency. CR 139, Exhibit S at p. 120; CR 472, Exhibit 8 at pp. 66, 67, 75, 76.[3] Sussel insisted that a meeting be held to resolve this dilemma. A meeting was held on January 9, 1985, with the City's Managing Director, Civil Service Director and Corporation Counsel. Sussel attended with his union representative and union lawyer who demanded the prompt resolution of the "loss of responsibility — continued liability" dilemma or else they would bring a lawsuit against the City. The day after the meeting, Sussel wrote to the Managing Director wherein he reiterated his objection of having to "answer to Mr. Kekuna," and again expressed his concern about being held "liable in the event of an emergency." CR 399, Exhibit 1.

The City officials determined that the only legal means under the City's Civil Service Rules by which they could resolve the dilemma, and thereby satisfy Sussel, without causing him any loss in pay, would be by way of a downward reallocation (reclassification) of Sussel's position but with a pay differential

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[3]CR refers to the Clerk's Record in DC 86-1136.

in order to maintain his basic pay. CR 121, Exhibit I at pp. 79, 80, 138, 139, 140, 190, 205; CR 472, Exhibit 8 at p. 68. Under those processes, the responsibilities attached to the position, which Sussel claimed he did not have, would be removed and thus the issue of potential tort liability would be resolved while still maintaining Sussel's basic salary.

The civil service process effecting the reclassification was commenced on January 11, 1985, with written notice thereof to Sussel on January 18, 1985. CR 394, Exhibit D; CR 395, Exhibit 13D. On January 25, 1985, before the "downward reallocation" or reclassification was to take effect on February 1, Petitioner appealed the proposed personnel action to the City's Civil Service Commission contending that the action was tantamount to a demotion, and was not a downward reallocation. CR 139, Exhibit B at p. 8; CR 121, Exhibit F. He complained that he did not receive the required ten-day written notice together with a showing of "cause" called for under the Civil Service Rules in the case of a demotion. Within a few days of receiving this notice, Sussel absented himself from his employment for a period of approximately one year.

On January 7, 1986, the City's Civil Service Commission decided that Sussel's position was not within the City's Civil Service system. Sussel appealed that decision to the State Circuit Court which, on May 22, 1987, reversed the Commission and ruled that Sussel's position was in the City's Civil Service, and remanded the matter back to the City's Civil Service Commission for appropriate proceedings. However, before the State Circuit Court ruling was handed down, Sussel filed a 45-page complaint in the U. S. District Court for the District of Hawaii, Civil No. 86-1136, under 42 U.S.C. § 1983 and pendent state claims for, amongst others, alleged deprivation of his constitutionally guaranteed due process and freedom of political belief and association rights.

After the State Circuit Court remanded the matter back to the City's Civil Service Commission, Sussel also sued in the State Court seeking the removal of several Civil Service Commission members on the grounds of bias (including one member who voted in his favor). The State Circuit Court found one member of the Commission biased, but denied Sussel's request for injunctive relief to bar the Civil Service Commission from

hearing Sussel's claim. CR 395, Exhibit 17 at p. 12. Sussel appealed this decision to the State Supreme Court. On Sussel's motion before the State Supreme Court, further Civil Service Commission action was stayed pending the State Supreme Court's resolution of Sussel's appeal.

On April 29, 1988, Sussel filed a second complaint in the State Circuit Court, which, but for the addition of two more claims, was virtually identical to his complaint originally filed in the U. S. District Court for the District of Hawaii, Civil No. 86-1136. In this complaint, Sussel alleged that he was "forced against his will" to file this second complaint. 2ER 1, Exhibit B at p. 2. That state action was removed to the U. S. District Court for the District of Hawaii under Civil No. 88-00375.

Sussel's consolidated complaints before the U. S. District Court for the District of Hawaii alleged some 17 causes of action, including, *inter alia*, a violation of due process guaranteed under the Fourteenth Amendment to the United States Constitution, a violation of First Amendment rights of free speech, and a violation of 42 U.S.C. § 1983. ER 1; 2ER 1, Exhibit B; CR 150.[4]

Some 14 separate motions were filed by Sussel and some of the Respondents in the District Court. All motions (except two, not pertinent to this Petition) were for summary judgment, partial summary judgment or to dismiss part or all of Sussel's complaints, with the latter being converted to motions for summary judgment because matters outside the pleadings were considered.

Following the remand to the State by the District Court, Sussel appealed the personnel action taken by the City's Civil Service Director to the City's Civil Service Commission. In December 1990, he had a full blown hearing before a Special Master duly appointed by the City's Civil Service Commission. Sussel filed his prehearing statement with the Commission naming approximately 200 witnesses to be called, which included U.S. District Court Judge David A. Ezra who granted the City's motion for summary judgment dismissing Sussel's federal

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[4]ER and 2ER refer to Excerpts of Record in DC 86-1136 and DC 88-00375, respectively, filed in the Ninth Circuit. These cases were consolidated in the District Court. *See* n. 3 for CR reference.

claims and who remanded the matter back to the Civil Service Commission. Sussel's witness list also included the attorneys for Fasi and the City. In submitting a similarly lengthy prehearing statement of witnesses on August 18, 1988, Sussel's attorney estimated that each witness would be examined for a total of three hours. CR 140, Exhibit F.[5]

The Special Master, independently of the Ninth Circuit's Memorandum Decision, narrowed the issues to be decided by him as 1) whether or not the personnel action taken by the City through its Department of Civil Service was a "downward reallocation" or a "demotion," and 2) whether or not the personnel action taken, however characterized, was politically motivated.

The appeal of the Civil Service Director's personnel action was an adversary hearing before the Special Master and extended over the course of 11 days after numerous prehearing motions had been heard. Voluminous written and lengthy oral evidence was presented, which was thereafter supplemented with extensive post-hearing briefs, proposed findings of fact and conclusions of law.

Thereafter, the Special Master, with reasonable diligence, offered proposed findings of fact, conclusions of law and a proposed decision and order to the effect that the personnel action was a demotion, but was not politically motivated.

Promptly after the receipt by the Commission of the Special Master's proposals, the parties were allowed further arguments before the full Civil Service Commission on exceptions taken by them to the Special Master's proposals. On June 26, 1991, the Civil Service Commission, upon a review of the record developed by the Special Master, duly adopted its own findings of

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[5]The government employees' union lawyer, Charles K.Y. Khim, who initially represented Sussel before the City's Civil Service Commission, withdrew his appearance on the eve of the commencement of the taking of evidence by the Special Master in December 1990. This withdrawal by counsel was apparently prompted by the filing in the previous month by Sussel of (1) unfair labor practice and (2) prohibited practice complaints before the Hawaii Labor Relations Board against the government employees' union. Mr. Khim felt this action placed him in a conflict of interest under the Hawaii Bar's Code of Professional Responsibility. *See* Affidavit of Charles K.Y. Khim, Appendix B at pp. 3a, 4a.

fact, conclusions of law and decision and order.

The Civil Service Commission disagreed with the Special Master and found that the personnel action taken by the City's Director of Civil Service was a reasonable exercise of discretion given to her and, in effect, was a downward reallocation as defined by Civil Service Rules, and not a demotion. On the other hand, the Commission agreed with the Special Master that the personnel action was taken without any political motivation on the part of the City and its officials. *See* Civil Service Commission's "Final Decision and Order," Appendix C at p. 6a. Since the Commission concluded that there was no demotion, Sussel's request for reinstatement was rendered moot.

On July 10, 1991, Sussel filed an appeal of the Civil Service Commission's actions, pursuant to the State Administrative Procedure Act and the Hawaii Rules of Civil Procedure, to the State Circuit Court. Thus, Sussel has completed the administrative process and has now triggered the judicial process provided by state law that will determine "the property interest in question," if any.[6]

II.

SUMMARY OF ARGUMENT

The Ninth Circuit's December 6, 1990 Memorandum Decision, as amended by its February 7, 1991 Order, properly affirmed the District Court's summary judgment disposition of all of Sussel's federal claims, and did not give rise to any special and important reasons that would support this Court's review on writ of certiorari. *See* Petitioner's Appendices A and B. Moreover, the Petition fails to show that the Ninth Circuit's decision conflicts with other decisions in the Ninth Circuit or with other courts of appeal and does not provide any other reason which would prompt this Court to exercise its discretion to grant the Petition.

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[6]Sussel has publicly announced that he is prepared to appeal the State Circuit Court decision, if necessary, to the State Supreme Court. He also claims that in the event of his demise before the matter is ultimately resolved, he has provided in his last will and testament for the continuation of the case after his death. *Honolulu Star-Bulletin*, Wednesday June 19, 1991, p. A-5. *See* Appendix D at p. 29a.

The District Court which originally dismissed Sussel's federal claims, recognized the inappropriateness of seeking a writ of certiorari in this matter. When a hearing on remand from the Ninth Circuit was held before Judge David A. Ezra in the District Court, the following exchange occurred between the Court and Sussel's counsel:

> THE COURT: Mr. King, with all due respect to your client's desire to see this go to the Supreme Court, my candid opinion is that you don't have a likelihood of success in getting the United States Supreme Court to grant certiorari on Mr. Sussel's claims. There is nothing novel, No. 1; nothing particularly imperative for the nation as a whole, No. 2. It's much a fact driven set of circumstances. That was made clear in my opinion; that was made clear in the Ninth Circuit's opinion. This is not the kind of case that the United States Supreme Court takes on certiorari on a regular basis. They turn down thousands of these every year.
>
> I understand that Mr. Sussel has become, if you will, engrossed in this litigation; such that he feels, I'm sure, that his claims are such that the United States Supreme Court must determine them. But they must not determine anything, they have the discretion to determine those cases that they wish to determine; and this just does not appear to be the kind of case which I see the United States Supreme Court granting certiorari on.
>
> MR. KING: I respect your opinion, Judge, but as an attorney for my client, I have an obligation.

See Excerpts from Partial Transcript of Proceedings, May 28, 1990, District Court. Appendix E at p. 31a.

Moreover, Sussel's Petition is premature in that he has triggered (1) the State's administrative process which has run its course and (2) an appeal of the administrative process to the State's judicial process which has not yet run its course.

Therefore, Sussel's Petition for Writ of Certiorari should be denied.

III.

ARGUMENT

REASONS FOR DENYING THE WRIT

This case does not involve a "politically-motivated demotion." Therefore, the Ninth Circuit was not "confused as to the proper causation standard to be applied in this case involving a politically-motivated demotion." (*See* Petition, Reasons for Granting the Writ I at p. 11.)

Once it was determined on the motions for summary judgment that there was no dispute as to any material facts and that summary judgment was appropriate on the First and Fourteenth Amendment claims and the § 1983 claims, then the heart of the case involved having to decide what was the proper forum for determining the threshold question of whether or not the personnel action was a downward reallocation or a demotion.

Neither the District Court nor the Ninth Circuit erred in this regard. The Ninth Circuit could not have put it more clearly when it stated at the outset of its Memorandum Opinion that "[t]o determine whether a genuine issue of fact is presented on the question of due process we first determine if there was a property interest and if so, what process was due before the government could deprive Sussel of that property interest. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)." *See* Petitioner's Appendix A at p. 8a. The Ninth Circuit then properly concluded that the appropriate forum in which to resolve the threshold question was in the state. And until that resolution occurred, Sussel could not overcome the City's motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Thus, Sussel's true complaint (although nowhere expressly articulated in his Petition) is that both the District Court and Ninth Circuit failed to meet the requirements of Rule 56 of the Federal Rules of Civil Procedure. The contention is groundless.

A. The Ninth Circuit Court Of Appeals Did Not Err In Affirming The District Court's Grant Of The City's Motion For Summary Judgment Dismissing Sussel's Claim To A Right Of Political Belief And Association Under The First Amendment.

The District Court's grant of summary judgment dismissing Sussel's federal claims was reviewable *de novo* by the Ninth Circuit. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

To avoid summary judgment on the political patronage ground of his § 1983 claim, Sussel had to prove that 1) patronage was a substantial motivating factor and 2) that there was an unconstitutional official policy involving political patronage. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Celotex v. Catrett*, 477 U.S. 317 (1986).

Summary judgment in favor of the City was appropriate since there was an absence of any facts proving that the hiring of Kekuna or reassignment of Sussel's duties were accomplished pursuant to an unconstitutional official municipal policy or custom. ER 535 at 20, 21.

In order to avoid summary judgment, Sussel had to present evidence that political patronage was a "*substantial factor*" in the decision to remove his duties as the Civil Defense Administrator, and that political patronage was a substantial factor in the decision to hire Kekuna. *Mt. Healthy*, 429 U.S. at 287.

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"---or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him.

Id. at 287 (footnote omitted).

If Sussel had discharged this burden, then the burden would have shifted to the City to show by a "preponderance of the evidence that it would have reached the *same* decision as to respondent's reemployment *even in the absence of the protected conduct.*" *Id.* at 287 (emphasis added).

Viewing the evidence in the light most favorable to Sussel, there was a complete absence of evidence to prove that political patronage was a motivating factor in the hiring of Kekuna or

the reassignment of new duties to Sussel. Since there was no proof of political patronage as the motivating factor, there obviously could be no proof of an official policy or custom of patronage.

Sussel accused the City's Civil Service Director of "doing what she's been instructed to do" but admitted that he did not "have any knowledge" of facts to support his charge. CR 391, Exhibit A at p. 142.

Sussel also testified that he believed that the City's Civil Service Director was motivated by "greed" in reallocating his position and not because of any alleged political activities by Kekuna or the fact that Sussel was a Democrat. CR 391, Exhibit A at pp. 16, 71. According to Sussel, the Civil Service Director "still retains her office, so obviously she contributed two thousand dollars to Fasi. Everyone in appointed positions were required to support him in one way or another, cook pancakes or do something. So I'm assuming. I have no facts to support that." CR 391, Exhibit A at pp. 138, 139.

Sussel's "political motivation" allegations were insufficient to state a claim upon which relief could be granted. He alleged no more than that "he was replaced by Defendants with a member of the republican party to which Defendant Fasi belonged, but to which Plaintiff did not belong." (Paragraph 60 of Sussel's Second Complaint. 2ER 1 at p. 21.) This was nothing more than a bald allegation based solely on the fact that Sussel did not belong to the same political party as Fasi (nor to any other political party), and nothing more. Moreover, Sussel was never "replaced."

It is Sussel's contention that the Ninth Circuit "did not expressly state that Petitioner had failed to allege facts to support a claim that the exercise of his First Amendment rights of political belief and association was a substantial or motivating factor for his demotion." Petition at p. 13. To the contrary, the Ninth Circuit expressly and properly found that Sussel failed "to establish a genuine issue of material fact" in that "[h]e has not alleged facts that support a claim that the exercise of his first amendment rights was a substantial or motivating factor for the actions taken towards him." *Citing Mt. Healthy*, 429 U.S. at 287. Petitioner's Appendix A at p. 9a. And in response to Sussel's allegation that he was "demoted," the Ninth Circuit

further found that Sussel "failed to present sufficient probative evidence that he was demoted because of his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2735 (1990)." Petitioner's Appendix B at p. 14a.

The District Court viewed the foregoing evidence in the light most favorable to Sussel and found there was a complete absence of evidence to prove that political patronage was a motivating factor in the reassignment of new duties to Sussel. Obviously, on the same record, the Ninth Circuit, in its *de novo* review, was irrefragably driven to the same conclusion.

B. **The Ninth Circuit Court Of Appeals Did Not Err In Affirming The District Court's Grant Of The City's Motion For Summary Judgment Dismissing Petitioner's Due Process Claims Under The Fourteenth Amendment.**

The Ninth Circuit properly affirmed the District Court's findings that there was no procedural or substantive due process violation, thus compelling a grant of summary judgment in favor of the City. *Celotex v. Catrett*, 477 U.S. 317 (1986). In its *de novo* review, the Ninth Circuit was compelled to affirm the District Court's decision.

The District Court found that Sussel was in the "civil service." This meant that Sussel would then be afforded the protection that civil service status gave him, including the right to appeal an adverse decision by the City's Civil Service Director to the City's Civil Service Commission and the right to a hearing under that process. (Rule 1.1-A.5.1 of the Revised Rules of the Civil Service Commission and Section 6-308 of the Revised Charter of the City and County of Honolulu 1973 (1984 Edition). Appendix F at p. 35a; Appendix A at p. 1a.)

The District Court correctly ruled that the City had a system, i.e., the Civil Service Commission, specifically designed to provide remedies to the Petitioner for alleged violations of his procedural due process rights. The District Court also noted that the City had not yet reached a final decision, that the process was still pending, and that the only conclusion reached thus far (i.e., the civil service issue) was in Petitioner's favor. The District Court refused to find that the City's system was "constitutionally defective" and that "as long as that system is

working and is not fundamentally deficient, [Petitioner] has not been deprived of the due process that system affords." ER 535 at p. 46.

The District Court ruled that the case should be litigated administratively or in the state courts and that basically the cause of action for due process was premature. Such administrative process or determination by the state courts had not yet occurred and therefore the cause of action based on due process claims had not yet accrued. In other words, there was no deprivation of due process at the time of the District Court's ruling and therefore it was not necessary to get to the § 1983 claims.

The District Court and the Ninth Circuit analyzed the question of whether or not the City Civil Service Commission would provide adequate due process to satisfy the constitutional guarantees therefor. Both courts recognized that the delays in the process at the state level were caused in part by both sides to the controversy, and that such delays had not reached such levels so as to have denied Sussel constitutionally adequate due process that the state system (i.e., City Civil Service Commission proceedings and judicial review thereof) was designed to provide.[7]

Both the District and Ninth Circuit courts implicitly agreed that the City Civil Service Commission would provide due process adequate to satisfy the constitutional guarantees thereof.

The Ninth Circuit correctly characterized the District Court's footnote to the effect that Sussel was "demoted" as *obiter dictum*. The finding of "demotion" was not necessary to the District Court's

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[7]"[T]hat Civil Service Commission proceedings are sometimes slow to reach a result, does not necessarily constitute a violation of due process. *Cf.* [*Cleveland Board of Education v.*] *Loudermill*, 470 U.S. [532] at 547 [(1985)]. The delay in this case is the result of legitimate appeals by the parties." *See* Ninth Circuit Opinion, Petitioner's Appendix A at p. 9a.

"Further, as the procedural history indicates, plaintiff is responsible for at least a share of the delay which has occurred since the Commission's decision was initially rendered. This court notes that the petitioning of the Commission and filing of appeals by both parties are valid stratagem and are recognized rights guaranteed by the term 'due process'. Therefore, this court finds that the delay since January 7, 1986, the date of the original Commission decision, is the result of the appeals process inherent in administrative proceedings and is not fundamentally deficient." *See* District Court Decision, Petitioner's Appendix C at p. 43a.

determination of "civil service" status and far exceeded the scope of any of the requested relief sought by Petitioner in his motion for summary judgment which sought a determination of "civil service" status.

In oral arguments before the Ninth Circuit, the City offered, as it did in its written brief, that the District Court's footnote finding that Sussel was demoted, rather than downward reallocated, was *obiter dictum.* All of Sussel's claims, and each of his first five Questions Presented for Review and first five Reasons for Granting the Writ (which are the only ones relevant to the Petition), are dependent and premised on the erroneous assumption that he was demoted. The District Court's ultimate decision was not premised on a finding that Sussel was demoted, but only that his position was one in the City's Civil Service. Even absent such finding, the District Court's decision that the cause of action had not yet accrued would be upheld. Significantly, however, the Ninth Circuit did not accept the District Court's footnote finding that Sussel was demoted as evidenced by the following colloquy during oral arguments before it:

> MS. DEVENS [counsel for City]: And that's why I think that the court's demotion finding, a footnote for it is dictum.
>
> The court didn't give it a considered analysis. If you look at the rules that define what a demotion is and what downward rellaction [sic] is —
>
> JUDGE FARRIS: Well, we know what the court did. The court relied on the testimony of a one person who said he was demoted. That's all the court did.
>
> He didn't make a factual finding, he made a statement based on a statement made by a person who had, as Mr. King properly argued, stated that that's what happened. She was in a position to know so the judge took that as what happened. Isn't that pretty much what the record shows?
>
> MS. DEVENS: Yes.

Excerpts from Partial Transcript of Proceedings, April 9,

1990, Ninth Circuit. Appendix G at p. 36a.

In its Memorandum Decision that subsequently followed, the Ninth Circuit specifically found that,

> Sussel, however, was not terminated. He continues employment with the city and collects the same salary as he did before the acts complained of. The dispute is not whether demotion is an interest protec ed by the due process clause but whether Sussel was demoted or merely downwardly reallocated. The latter process is not protected by due process. State law determines the property interest in question but federal law determines whether or not the taking of such interest is a violation of due process. *See* Logan, 455 U.S. at 432.

Petitioner's Appendix A at p. 8a.

Certainly, Sussel should have thus been convinced that the Ninth Circuit made clear that it found no demotion, but only that there was a question of whether the personnel action taken was a downward reallocation or a demotion. Nevertheless, in his *third* Petition for Rehearing to the Ninth Circuit, Sussel persisted:

> The Opinion [Ninth Circuit Memorandum Opinion] still states (p. 4) that there is a dispute "whether Sussel was demoted or merely downwardly reallocated" and that the latter process is not protected by due process. However, this overlooks the District Court's express rejection of the downward reallocation defense and its legal conclusion that Sussel had been *demoted.* (Emphasis in original.)
>
> * * *
>
> The [Ninth Circuit] Court's misstatement of this finding on page 4 of its Opinion should be corrected.

Just as the Ninth Circuit ignored Sussel's pointing out its "error" in his first Petition for Rehearing of August 20, 1990 (pp. 13-14), and further ignored Sussel's request that the Ninth Circuit correct its "misstatement" in his second Petition for

Rehearing dated December 19, 1990, it also ignored Sussel's *third* request to correct its "misstatement" in his Petition for Rehearing filed February 20, 1991. Notwithstanding this repeated reaffirmation by the Ninth Circuit, Sussel still refuses to accept the fact that the Ninth Circuit meant what it said in its original Memorandum Decision and as subsequently amended, that "[t]he dispute is . . . whether Sussel was demoted or merely downwardly reallocated[,]" and that it is the "[s]tate law [that] determines the property interest in question . . . ." Petitioner's Appendix A at p. 8a.

Subsequent to the District Court's grant of the City's various motions for summary judgment and remand of the matter back to the State, Sussel availed himself of the administrative process accorded him under the State Administrative Procedure Act and the City Charter and Civil Service Rules to determine "the property interest in question," i.e., whether or not his civil service position was downward reallocated or whether he was removed from his position by way of a demotion. The administrative process initiated by Sussel, but delayed in large part due to various legal actions brought by him, was an adversarial process by way of a "contested case hearing" provided under the Hawaii Administrative Procedure Act. Haw. Rev. Stat. § 91-9. Appendix H at p. 39a. The issues involved in the administrative hearing were clearly defined, i.e., whether or not the personnel action in question was a "downward reallocation" or a "demotion" and, in whichever form, whether or not the action was "politically motivated." The administrative hearing afforded all parties the right to present evidence and argument on all the issues with the right of examination and cross examination of all witnesses. The administrative hearing was an extensive one, involving numerous witnesses and dozens of documents, most of which were offered by Sussel.

Sussel first appealed to the Civil Service Commission the Special Master's proposed finding that the personnel action taken was not politically motivated. Thereafter, Sussel appealed to the State Circuit Court, pursuant to the State Administrative Procedure Act, the Civil Service Commission's findings

that the personnel action taken was a downward reallocation and that it was not politically motivated. Haw. Rev. Stat. § 91-14 "Judicial Review of Contested Cases." Appendix H at p. 40a.

This latter pending appeal was filed as recently as July 10, 1991, and to which the City has filed a responsive pleading. Sussel has publicly announced that he will appeal to the State Supreme Court any adverse decision by the Circuit Court on his appeal of the Civil Service Commission's decision.

Thus far, Sussel has been accorded full due process in the administrative proceedings. Not being satisfied with the administrative conclusion resulting from the Civil Service Commission proceedings, Sussel has afforded himself a continuation of due process by the judicial appellate proceedings accorded him by state law. This is as it should be.

This Court should allow the State judicial process, triggered by Sussel's appeal of the Civil Service Commission's decision, to run its course in ultimately deciding whether or not the personnel action in question was a downward reallocation or a demotion. If it is the latter, then, as the Ninth Circuit properly and wisely held, "federal law determines whether or not the taking of such [property] interest is a violation of due process." *Citing Logan*, 455 U.S. at 432. Petitioner's Appendix A at p. 8a.

Therefore, the attempt to credit the Ninth Circuit with having created a difference between the *Mt. Healthy* "substantial or motivating factor" test in First Amendment free speech cases and the "solely because" test in the so-called First Amendment adverse employment cases, must fail. There was no such difference because the court never reached that point. Therefore, Sussel's Petition should be denied.

This Court should exercise its judicial discretion by denying Sussel's Petition for Writ of Certiorari since not until the State judicial process has run its course, will it be ripe to determine whether or not special and important reasons may or may not exist to support a petition for a writ of certiorari.

C. The Ninth Circuit Court Of Appeals Did Not Err In Affirming The District Court's Grant Of The City's Motion For Summary Judgment Dismissing Sussel's Civil Rights Claims Under 42 U.S.C. § 1983.

In order to avoid summary judgment on the issue of 42 U.S.C. § 1983 liability against the City, Sussel was required to make a showing sufficient to establish the existence of the elements essential to his case: 1) A violation of his constitutional rights, 2) that there was an official policy or custom to violate his constitutional rights, and 3) that the unconstitutional official policy or custom was the "moving force of the constitutional violation." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 695 (1978). Sussel failed to meet any one of those requirements which compelled a grant of summary judgment in favor of the City. *Celotex v. Catrett*, 477 U.S. 317 (1986). Once the City discharged its burden of pointing to an absence of any facts to support Sussel's § 1983 claim, under *Catrett*, in order to avoid a grant of summary judgment, the burden of proving the affirmative was on Sussel. Sussel completely failed to do so.

The record established in the District Court was absolutely void of any support for Sussel's allegation that 1) his reassignment of new duties violated his constitutional rights and that 2) his reassignment of new duties was accomplished pursuant to an unconstitutional official municipal policy. Indeed, since the District Court specifically found that 1) there was no procedural due process violation, 2) there was no substantive due process violation, and 3) there was no equal protection violation, it did not have to address the issue of whether the alleged constitutional violations were the result of a city "policy or custom." Even if the District Court had found such a policy or custom, Sussel failed to establish that such policy was the "moving force" of any constitutional violation.

The District Court's grant of the City's motion for summary judgment on the "political motivation" allegations was also proper in that those allegations were insufficient to state a claim upon which any relief could be granted. As noted

hereinabove, bald allegations will not suffice. *See* Argument A at p. 11. *See Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977). "[C]onclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act." *Sherman v. Yakahi*, 549 F.2d 1287 (9th Cir. 1977).

Sussel was required to have alleged material facts, as a minimum, that because he was not a Republican, that was a "substantial factor" in the City's decision to "reassign" duties to Sussel's "position" and to "downward reallocate" the same. Nothing in Sussel's two complaints allege any facts, much less material facts, that Sussel's political affiliation was a "substantial factor," or a factor at all in the defendants' actions.

The District Court viewed the evidence in the light most favorable to Sussel and found there was a complete absence of evidence to prove that political patronage was a motivating factor in the hiring of Kekuna or the reassignment of new duties to Sussel. Obviously, the Ninth Circuit Court arrived at the same conclusion.

The Ninth Circuit, in affirming the District Court, properly found that Sussel "has failed to present sufficient probative evidence that he was demoted because of his political affiliation." *Citing Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2735 (1990). Petitioner's Appendix A at p. 14a. Hence, there was no error by the Ninth Circuit.

IV.

CONCLUSION

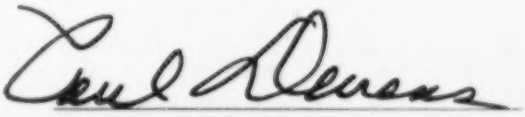
Sussel's Petition for Writ of Certiorari fails to present any special and important reasons for granting the petition; nor does it show that the Ninth Circuit's decision which affirmed the District Court's summary judgment disposition of all of Sussel's federal claims, conflicts with other decisions in the Ninth Circuit or other courts of appeal; nor does it provide any other reason which would prompt this Court to exercise its discretion to grant the petition.

Moreover, Sussel's Petition for Writ of Certiorari is premature since the State judicial process triggered by Sussel's appeal of the Civil Service Commission's Decision has yet to run its course, which it should be allowed to do.

Therefore, the City respectfully requests this Court to deny Sussel's Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, September 10, 1991.

Respectfully submitted,



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Attorney for Respondent
City and County of Honolulu

APPENDICES

APPENDIX A

Revised Charter of the City & County of Honolulu 1973 (1984 Ed.)

Section 6-102. Powers, Duties and Functions — The managing director shall:

(a) Supervise the heads of all executive departments and agencies assigned to the managing director by section 4-102 of this charter.

* * *

Section 6-308. Appeals —

1. Any person aggrieved by any action of the director of civil service or who has been suspended, demoted or dismissed may appeal to the civil service commission for redress, pursuant to its rules and regulations.

2. If the civil service commission, after a hearing, orders a demoted, dismissed or suspended employee reinstated, it may reinstate such employee under such conditions as it deems proper.

APPENDIX B

CHARLES K.Y. KHIM #2731
Attorney at law
City Financial Tower, Suite 1620
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Honolulu, Hawaii 96813
Telephone: (808) 537-5305

Attorney for Plaintiff Malcolm A. Sussel

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MALCOLM A. SUSSEL, *Plaintiff* vs. CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity as Mayor of the City and County of Honolulu; D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu;	) CIVIL NO. 88-1285-04) (Declaratory Judgment))) AFFIDAVIT OF) CHARLES K.Y. KHIM;))))))))) TIME: 9:00 a.m.)) DATE: August 20, 1991)) JUDGE: The Honorable) Robert G. Klein))))	

JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu; and JOHN AND MARY DOES 1-10,

Defendants.

AFFIDAVIT OF CHARLES K. Y. KHIM

Charles K. Y. Khim, being first duly sworn upon oath, deposes and says that:

1. He makes this affidavit upon personal knowledge unless otherwise stated;

2. He is the attorney for Malcolm A. Sussel in the above captioned matter. In addition, Dennis W. King, Esq., who upon information and belief, is an attorney licensed to practice law in the State of Hawaii is also an attorney for the Plaintiff Malcolm A. Sussel in the above captioned matter;

3. The Affiant is also an attorney who has been retained by the Hawaii Government Employees' Association, AFSCME Local 152, AFL-CIO, hereinafter referred to as HGEA/AFSCME on a continual basis to represent the HGEA/AFSCME in numerous matters. The Affiant's representation of the HGEA/AFSCME referred to above antecedes the representation of the Plaintiff Sussel in the above captioned matter;

4. On or about November 19, 1990 the Plaintiff Sussel filed with the Hawaii Labor Relations Board, hereinafter referred to as HLRB an unfair labor practice complaint against

the HGEA/AFSCME. On or about November 20, 1991 the Plaintiff herein Malcolm A. Sussel filed with the HLRB a prohibited practice complaint against the HGEA/AFSCME;

5. The Affiant filed on behalf of the HGEA/AFSCME answers to both the aforesaid prohibited practice complaint and the aforesaid unfair labor practice complaint;

6. Due to the fact that attorney King also represents the Plaintiff Sussel in the above captioned matter and prepared pleadings in Plaintiff Sussel's cases before the Circuit Court including the instant matter, pleadings without prior consultation with or prior knowledge of, the Affiant, and that attorney King had made an appearance on behalf of Plaintiff Sussel in the HLRB's proceedings over the aforesaid prohibited practice complaint and the aforesaid unfair labor practice complaint, it appears that attorney King has actively taken over all of Plaintiff Sussel's aforesaid litigation including, but not limited to, the above captioned matter;

7. Upon information and belief, but without personal knowledge, attorney King, Plaintiff Sussel, or both stated to the Civil Service Commission of the City and County of Honolulu, hereinafter referred to as Civil Service Commission, on or about May 21, 1991, that the Affiant still actively represents Plaintiff Sussel in the above captioned matter;

8. In response to the foregoing statements of attorney King, Plaintiff Sussel, or both, on or about June 21, 1991 the Affiant sent both Plaintiff Sussel and attorney King a letter stating that there is potentially a conflict of interest between the Affiant's representation of both the HGEA/AFSCME in the proceedings being conducted by the HLRB over the unfair labor practice complaint referred to above and the prohibited practice complaint referred to above, and the representation of Plaintiff Sussel in the above captioned matter;

9. The Affiant in his aforesaid June 21, 1991 letter requested that Plaintiff Sussel, after being fully informed of the potential conflict of interest referred to above, inform the Affiant as to whether or not he wishes to waive the aforesaid potential conflict of interest referred to above pursuant to the dictates of DR 5-1-5(C) of the Code of Professional Responsibility which provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the

interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each";

10. Late in the afternoon of Friday, July 26, 1991 the Affiant received a letter from attorney King who spoke on behalf of both himself and Plaintiff Sussel. This letter informed the Affiant that the aforesaid potential conflict of interest was not waived by Plaintiff Sussel pursuant to DR 5-105(C);

11. DR 5-105(B) states that "a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C)";

12. By reason of the foregoing, it is the position of the Affiant that under DR 2-110 of the Code of Professional Responsibility and by reason of the premises the Affiant submits that he must withdraw as counsel for Plaintiff Sussel, that Plaintiff Sussel will not be prejudiced by this withdrawal of counsel since he is already represented in the above captioned matter by attorney King; and

13. The Affiant has verified that the address and telephone number of the Plaintiff Sussel are: 59-497 Makana Road, Haleiewa, Hawaii, 96712; telephone: (808) 638-7567, and the Affiant has advised Plaintiff Sussel that he is obligated to inform the clerk of court of any changes of his mailing and residence address, and telephone number.

FURTHER AFFIANT SAYETH NAUGHT.

/s/CHARLES K. Y. KHIM
CHARLES K.Y. KHIM

Subscribed and sworn to before me this
29th day of July, 1991.

/s/Sue A. Kaneshiro
NOTARY PUBLIC - STATE OF HAWAII
My Commission Expires: 12/17/94

APPENDIX C

BEFORE THE CIVIL SERVICE COMMISSION
CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

In the Matter of the Appeal of	)	
	)	
MALCOLM A. SUSSEL,	)	FINAL DECISION
	)	AND ORDER
Appellant.	)	
	)	

FINAL DECISION AND ORDER

INTRODUCTION

This appeal came on for hearing before the City and County of Honolulu Civil Service Commission (hereinafter "Commission"). Dennis W. King, Esq., represented Malcolm A. Sussel (hereinafter "Appellant"). Paul Devens, Esq., represented the City and County of Honolulu (hereinafter "Employer"). Steven M. Nakashima, Esq., represented the Mayor Frank F. Fasi, as a party-intervenor (hereinafter "Mayor").

The issue in this appeal centers around whether the personnel action taken by the Employer against Appellant violated any Civil Service law, rule or regulation. Specifically, the issue is whether Appellant was illegally stripped of all powers and authorities as the Oahu Civil Defense Administrator and was involuntarily demoted, without proper cause and in violation of applicable civil defense and civil service laws, rules, regulations and policies. *See* Appellant's Petition of Appeal dated January 25, 1985.

The Commission concludes that Appellant was not illegally stripped of his powers and authorities as the Oahu Civil Defense Administrator and was not demoted. Instead, Appellant's position was properly reallocated downward in accordance with applicable Civil Service laws, rules and regulations.

Accordingly, the instant appeal is denied.

PROCEDURAL RECORD

This Commission originally entered its Findings of Fact, Conclusions of Law, Decision and Order in this matter on January 7, 1986. The Commission's Decision and Order found that Appellant had no civil service status, that the reassignment of Appellant's duties was not subject to review by the Commission, and that Appellant was not demoted.

This Decision and Order by the Commission was then appealed by Appellant to the First Circuit Court of the State of Hawaii. In a decision dated May 22, 1987, Judge Edwin H. Honda found that Appellant was a civil service employee. Accordingly, the Court vacated the Commission's Decision and Order, and remanded the case back to the Commission for further proceedings consistent with the Court's ruling.

On remand, the Commission decided to conduct these proceedings *de novo.*

Pursuant to section 76-47, Hawaii Revised Statutes, and Civil Service Rule 5.4f, the Commission appointed Walter H. Ikeda as a Special Master to hear evidence in this case. *See* letter dated June 1, 1990, from Acting Chair Beverly Nagy.

Hearings were held over 11 separate days, from December 10, 1990 to January 15, 1991. During these hearings, evidence was submitted to and received by Special Master Ikeda.

On April 24, 1991, Special Master Ikeda issued his proposed Findings of Fact; Conclusions of Law; Decision and Order (hereinafter "Proposed Decision and Order").

All parties hereto had the opportunity to file exceptions to the Proposed Decision and Order, and the opportunity to present oral arguments to the Commission, in accordance with section 91-11, Hawaii Revised Statutes. Oral arguments were heard by the Commission on May 21, 1991 and on June 18, 1991.

The Commission, having duly considered the testimony and exhibits presented at the hearing and having heard the arguments of all parties and having been advised of the issues, hereby makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Employer, in a document entitled "Appellees' Exceptions To The Proposed Findings Of Fact; Conclusions Of Law; Decision And Order By The Special Master Dated April 24, 1991," submitted and proposed its own Findings of Fact and Conclusions of Law. These proposals were contained in Exhibit A, which was attached to the aforementioned document. They were received by the Commission on or about May 13, 1991. The Commission hereby adopts and accepts the following proposed Findings of Fact and Conclusions of Law, as its own:

Employer's Findings of Fact Nos. 1 - 16, 18, and 22 - 64. Any reference therein to "Special Master" shall be changed to "Commission."

Employer's Conclusions of Law Nos. 1 - 16. Any reference therein to "Special Master" shall be changed to "Commission."

Employer's Findings of Fact Nos. 17 and 19 - 21 refer to Appellant's competency, which the parties agreed was not an issue. Accordingly, the Employer's Findings of Fact Nos. 17 and 19 - 21 are rejected.

In addition to the foregoing, the Commission makes the following Findings of Fact:

1. Effective June 2, 1982, Appellant was appointed to the position of Executive Assistant I (Civil Defense Administrator), EM-07, (Position No. CD 300) by then Mayor Eileen Anderson.

2. This position has been deemed by the Court to be a civil service position, and accordingly, Appellant is to be considered a civil service employee. *See* Judge Edwin H. Honda's Decision and Order file-dated May 22, 1987 in *Sussel vs. Civil Service Commission of the City and County of Honolulu, et al.*; First Circuit Court of the State of Hawaii; Civil No. 86-328.

3. On or around January 18, 1985, Appellant's duties and responsibilities as Executive Assistant I (Civil Defense Administrator), EM-07, (Position No. CD 300), were reassigned and changed by the Employer. Appellant still retained certain staff responsibilities but was divested of any supervisory authority. *See* Special Master Ikeda's proposed Finding of Fact No. 28.

4. Pursuant to this reassignment and change of duties and responsibilities, Appellant's position was moved "to another class," i.e., Administrative Assistant II, SR-21, (Position No. CD 300). Appellant was not moved "to another position." Appellant

continued to occupy Position No. CD 300. *See* Employer's proposed Finding of Fact No. 57 and No. 62.

5. In addition, when Appellant was moved "to another class," his salary at his former classification was preserved. This was accomplished through a process using temporary differential pay, or what is commonly referred to as "red circling." *See* Employer's Finding on Fact No. 52. The Commission is not aware of any instance wherein a civil service employee upon being demoted, had his salary "red circled." This adds further support to the conclusion that Appellant was reallocated and not demoted.

6. Civil Service Rule 1.1-C.33 defines a "Reallocation Downward" as follows:

> The reallocation [i.e., *the movement of a position from one class to another class*] of a position:
>
> (1) to a class assigned to a lower pay range in the same compensation schedule, or
>
> (2) to a class in another compensation schedule with a lower maximum rate of compensation and the dollar difference between the two maximum rates is more than the dollar difference between the minimum and second steps of the former pay range; provided that a rate of five percent more than the minimum rate of the range shall be deemed to be equivalent to the second step in the EM schedule.
>
> (Note: Material in brackets is the definition of "reallocation" as defined in Civil Service Rule 1.1-C.32.)

(Emphasis added).

7. Civil Service Rule 1.1-C.10 defines a "Demotion" as follows:

> The movement of a regular employee from the position in which such employee last held permanent appointment *to another position*:
>
> (1) which is assigned to a class with a lower pay range in the same compensation schedule, or
>
> (2) which is assigned to a class with a lower maximum rate of compensation in another compensation schedule and the dollar difference between the two maximum rates is more than the dollar difference between the minimum

and second steps of the former pay range; provided that a rate of five percent more than the minimum rate of the range shall be deemed to be equivalent to the second step in the EM schedule.
(Emphasis added).

8. Any Finding of Fact stated herein which should more properly be construed as a Conclusion of Law shall be deemed to be such.

9. Any of the following Conclusions of Law which should more properly be construed as a Finding of Fact shall be deemed to be such.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, and in addition to the Employer's Conclusions of Law Nos. 1 - 16, which were adopted and accepted earlier in this Decision, the Commission makes the following Conclusions of Law.

1. The Civil Service Rules have been formally promulgated through the Hawaii Administrative Procedure Act (chapter 91, Hawaii Revised Statutes) and therefore, they have the force and effect of law.

2. Under Civil Service law, the Employer has the right to reassign and change the duties and responsibilities of a civil service employee.

3. Pursuant to Civil Service Rule 1.1-C.33, Appellant's position was reallocated downward. Appellant was not demoted. Therefore, Appellant's allegations with respect to being involuntarily demoted, without proper cause and in violation of law, are without merit.

4. Appellant's downward reallocation was justified. It was neither arbitrary or capricious, nor motivated by political considerations. Appellant, through his legal counsel, Charles K.Y. Khim, and his Hawaii Government Employees Association ("HGEA") union representative, Keith Ahue, expressed the concern to the Employer that Appellant had been stripped of his duties and responsibilities, yet Appellant was still left with possible liability in the event a claim was brought against the

Oahu Civil Defense Agency. *See* Employer's Finding of Fact No. 30. Therefore, the downward reallocation by the Employer was a reasonable means of addressing Appellant's concern.

5. The downward reallocation of Appellant's position was done properly. The concern raised with respect to noncompliance with the policies and procedures of the Budget Department is without merit.

6. First of all, the policies and procedures of the Budget Department are beyond the scope of this appeal. They do not involve an alleged violation of any Civil Service law, rule or regulation. Therefore, any violation or noncompliance with the policies and procedures of the Budget Department cannot be resolved by appealing to this Commission.

7. Secondly, assuming *arguendo*, that this Commission does have jurisdiction to resolve the matter of the alleged violation and noncompliance with the policies and procedures of the Budget Department, these policies and procedures are not rules under the Hawaii Administrative Procedure Act (chapter 91, Hawaii Revised Statutes). Therefore, these policies and procedures do not have the force and effect of law. They are just guidelines for the County departments to follow during a reallocation action. They merely assist in the internal processing of the reallocation action. Accordingly, a violation of these policies and procedures would not necessarily constitute a violation of law.

8. Thirdly, the policies and procedures of the Budget Department expressly state that "all *or only some of the steps may be utilized*, or several may be taken simultaneously" "depending upon the nature and complexity of the proposed course of action." (Emphasis added.) (Guidelines for Coordination in the Planning and Processing of Personnel Requests). In light of the foregoing provision, the Employer's downward reallocation of Appellant's position was not in violation of these policies and procedures.

9. Fourthly, the Budget Department's policies and procedures require that the reallocation be requested on a prescribed form showing a change in the positions being supervised, the impact of the organizational placement and an analysis to show why the duties merited the change. *See*

Special Master Ikeda's proposed Finding of Fact No. 36. The appropriate remedy to correct these procedural problems would be to order the Employer to comply with these requirements. Appellant's downward reallocation would not be negated or rendered void.

10. Finally, if there were any "injury" to Appellant in the nature of the lack of notice or the lack of opportunity to be heard, due to a violation or noncompliance with the Budget Department's policies and procedures, this injury has been cured by Appellant's appeal to this Commission. In appealing his "downward reallocation" to this Commission, Appellant was provided with a hearing on this matter as well as the opportunity to present evidence and cross-examine witnesses. After listening to all of the evidence and arguments, the Commission is satisfied that the existent circumstances justified the change in Appellant's duties by the Employer.

11. The process by which Mr. Kekuna was appointed into the position of Deputy Director Designate for the Oahu Civil Defense Agency was not politically motivated and was therefore, not violative of section 76-1(1), Hawaii Revised Statutes. *See* Special Master Ikeda's proposed Conclusion of Law No. 8.

12. The reallocation downward of Appellant's position was also not politically motivated and was therefore, not violative of section 76-1(1) or section 76-44, Hawaii Revised Statutes. Appellant has not met his burden of proof in showing that the reallocation downward of his position was politically motivated by either the Employer or the Mayor. In fact, Special Master Ikeda specifically concluded that Appellant was not reallocated downward due to political considerations. *See* Special Master Ikeda's proposed Conclusion of Law No. 8.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the appeal filed herein is hereby DENIED.

All findings of fact proposed by the parties or by Special Master Ikeda, which are inconsistent herewith or which are not expressly addressed in this Final Decision and Order, are

hereby rejected in accordance with section 91-12, Hawaii Revised Statutes.

DATED: Honolulu, Hawaii, June 26, 1991

CIVIL SERVICE
COMMISSION
CITY AND COUNTY
OF HONOLULU

/s/ Beverly Nagy
BEVERLY NAGY
Acting Chairman

/s/ Ginine Castillo
COMMISSIONER

/s/ Michael A. McGuire
COMMISSIONER

/s/ Charles Izumoto
COMMISSIONER

/s/ Neil P. Silva
COMMISSIONER

APPROVED AS TO FORM:

/s/ Francis Paul Keeno
FRANCIS PAUL KEENO
Deputy Attorney General

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Attorneys for APPELLEES
except MAYOR FRANK F. FASI

CIVIL SERVICE COMMISSION
CITY AND COUNTY OF HONOLULU

In the Matter of the Appeal of	) APPELLEES' PROPOSED
	) FINDINGS OF FACT AND
Malcolm A. Sussel	) CONCLUSIONS OF LAW;
	) CERTIFICATE OF
Appellant,	) SERVICE
	)
and	)
	)
The City and County of	)
Honolulu; Mayor Frank F.	) HEARING DATE:
Fasi; Managing Director D.G.	) December 10, 1990
"Andy" Anderson; Mr. George	)
Kekuna, Managing Director's	) SPECIAL MASTER:
Office; Ms. Loretta Fukuda,	) Honorable Walter Ikeda
Director of Civil Service,	)
	)
Appellees.	)

APPELLEES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 1.1-A.5.4-p of the Revised Rules of the Civil Service Commission, Appellees, the City & County of

Honolulu, D.G. "Andy" Anderson, George Kekuna and Loretta Fukuda, by and through their attorneys, IKAZAKI, DEVENS, LO, YOUTH & NAKANO, hereby submit the following proposed Findings of Fact and Conclusions of Law.

The above-entitled appeal came on for hearing before the Special Master, Mr. Walter Ikeda, duly appointed by the Civil Service Commission, commencing on December 10, 1990, and continuing through January 15, 1991, over the course of eleven separate days.

Appellant Malcolm A. Sussel was represented by his counsel, Dennis W. King. Appellee Frank F. Fasi was represented by his counsel, Steven M. Nakashima. All other Appellees were represented by Paul Devens and Caron M. Inagaki.

After hearing the testimony presented at the hearing and reviewing the closing memoranda and exhibits offered by the parties, and the case having been submitted for decision, the Special Master, being fully advised of the facts and circumstances of this matter, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On the issues raised in the hearing on Malcolm A. Sussel's appeal, the Special Master hereby finds the following facts:

1. Frank F. Fasi ("the Mayor") was elected as a Republican to the office of Mayor of the City and County of Honolulu in 1984. Reporter's Transcript ("RT") 12/10/90 at 34:24-35:3.

2. Prior to taking office, the Mayor sought to fill certain positions in the City government through a Blue Ribbon Committee, which was made up of citizens from a cross section of the community who worked as volunteers and received no compensation. RT 12/13/90 at 14:13-15:4, 152:16-153:23.

3. The purpose of the Blue Ribbon Committee was to seek applications for the various city government positions and to recommend one or two persons to the Mayor. The Mayor and members who served on the committee all testified that the committee's only criteria was to find the best qualified applicants for each position and that the applicant's political affiliations

was not a consideration in making their recommendations. There has been no evidence to the contrary. RT 12/13/90 at 20:10-13, 20:23-21:11, 255:23-257:25; RT 12/17/90 at 214:12-14, 219:16-220:4, 220:7-9; RT 12/19/90 at 136:15-20, 177:14-19, RT 12/21/90 at 175:10-16.

4. Of the six applicants for office of civil defense, one of the two recommended by the Blue Ribbon Committee for the head of City civil defense was George L. Kekuna ("Kekuna"). Exhibit ("Ex.") 129. RT 12/19/90 at 168:18-169:3, 170:16-21; RT 12/21/90 at 195:7-11.

5. Kekuna was at that time employed as a planner with the State Office of Civil Defense. RT 12/20/90 a.m. at 46:9-17.

6. Upon inquiry by the Mayor, General Alexis Lum, the State Director of Civil Defense and Kekuna's former employer, gave a favorable assessment of Kekuna's abilities to the Mayor based on Kekuna's job performance with State civil defense. RT 12/18/90 at 43:1-7, 62:20-63:22.

7. Although traditionally the practice was to appoint the Mayor of each county as the State Deputy Director of Civil Defense for that county, General Lum suggested to the Mayor that because of past difficulties with having the Mayor assume the two roles of Mayor and State Deputy Director of Civil Defense, perhaps someone other than the Mayor should be appointed State Deputy Director for the County of Honolulu. Ex. 16.

8. The Mayor agreed with General Lum and recommended Kekuna. He then asked General Lum to appoint Kekuna as Deputy Director. Ex. 18, Ex. 19.

9. General Lum, by letter dated January 2, 1985, tendered the appointment of Deputy Director of Civil Defense to Kekuna. Ex. B.

10. Subsequently, General Lum appointed the Mayor as Deputy Director of Civil Defense in a letter dated January 9, 1985, because he realized that the Mayor was in a better position to commit the necessary resources in case of an emergency. It was not a reflection on Kekuna's abilities. Ex. 23; RT 12/18/90 at 44:19-45:18.

11. When the Mayor assumed office on January 2, 1985, Kekuna was appointed to Position No. MD 134, Executive Assistant II, in the Managing Director's Office. Ex. 32.

12. The Mayor intended Kekuna to, amongst other duties assigned by the Managing Director, exercise supervision over the City's civil defense agency. RT 12/13/90 at 64:2-15.

13. In keeping with his belief that the City would be best served by having a "designate" take the Mayor's place as the traditional appointee to serve as State Deputy Director, the Mayor appointed Kekuna as "Deputy Director-Designate" to oversee the City's civil defense agency. Ex. 61; RT 12/13/90 at 64:6-15, 100:20-24, 101:21-102:5, 104:21-24. Kekuna was intended to be in a position between the Mayor and the City's civil defense agency and to be overseer in charge of the agency. RT 12/14/90 at 9:22-10:3.

14. Appellant Malcolm A. Sussel ("Sussel") had first learned that the Mayor had announced his intention to appoint Kekuna to head the City's civil defense agency on or about December 13, 1984. RT 12/20/91 p.m. at 93:21-94:9, 97:15-21.

15. That evening, Sussel composed a letter to the Mayor and had it hand-delivered to the Mayor at his campaign headquarters the next day. The letter was dated that day, December 14, 1984. Ex. 17. RT 12/20/90 p.m. at 97:15-21.

16. Sussel assumed that he was being removed or terminated from the position he then occupied in the City's civil defense agency, Executive Assistant I, Position No. CD 300 and believed, as he wrote in his letter, that it was a result of "information from various sources external to your team which could have been derogatory toward me." Thus, Sussel requested a meeting with the Mayor "to refute any allegations made against me and show you why I am the person you want and need for the job." Ex. 17.

17. The Special Master finds no evidence of any "external" sources providing "derogatory" information about Sussel to the Mayor. Accordingly, the Special Master finds that this was not a consideration by the Mayor when he appointed Kekuna to head the City's civil defense agency.

18. The Mayor agreed to meet with Sussel on the very next day, December 15, 1985, at the Mayor's Campaign Headquarters. D.G. "Andy" Anderson ("Anderson" or "Managing Director") was also present at the meeting. RT 12/20/90 p.m. at 98:1-9.

19. It was at this meeting that the Mayor learned of difficulties and/or disagreements between Sussel and General Lum. At the meeting, Sussel criticized General Lum and stated that the General was not acting in the best interests of the City and County. Ex. 29. RT 12/20/90 p.m. at 101:20-24. There is also evidence that Sussel had serious difficulties with members of General Lum's staff. RT 12/18/90 at 57:19-58, Ex. C.

20. Through Sussel's statements regarding General Lum, the Mayor also formed the opinion that Sussel was insubordinate to General Lum and felt that "insubordination against a commanding general could not exist" and felt that the City needed "a civil defense administrator who is going to cooperate with and have confidence in the fellow who heads the whole civil defense operation." RT 12/13/90 at 39:6-15.

21. Matters involving Sussel's competence are not to be considered for purposes of this hearing; however, the Special Master finds that the Mayor's opinion as to Sussel's insubordination toward General Lum is relevant for purposes of showing the reasons for the Mayor's belief that he needed someone above Sussel to communicate directly with State Civil Defense.

22. The Special Master also finds that the Mayor had a sincere concern about maintaining smooth and effective relations between the City's civil defense agency and the State Office of Civil Defense because of his responsibility for the health, safety and welfare of the residents of Honolulu in matters of natural disasters. RT 12/13/90 at 116:3-117:5.

23. Further indication that Sussel assumed that Kekuna's appointment meant that he was to be terminated from his position, was his letter of December 21, 1984, wherein he instructed his lawyer to ask the Mayor not to terminate him. Ex. 20. RT 12/20/90 at 105:7-14.

24. On January 2, 1985, Sussel met with Anderson and one of Anderson's staff members, Pat Ayers. Sussel tape recorded their conversation without Anderson or Pat Ayer's knowledge, then had the tape transcribed. RT 12/20/90 at 121:16-122:20. Ex. 47A.

25. In their conversation, Anderson stated specifically that Kekuna was to assume the role and responsibility of the Mayor as Deputy Director of Civil Defense and would be directly responsible for the City's civil defense agency. Anderson also assured Sussel that Sussel was not being fired or removed and would remain in his position. However, Sussel would be subject to Kekuna's authority, just as he would be subject to the Mayor's authority. Anderson further assured Sussel that he would retain his salary. Ex. 47A.

26. There has been no dispute as to the accuracy of the transcription and Anderson was unaware that the conversation was being recorded. For these reasons, the Special Master finds these statements by Anderson to be especially credible and persuasive. The Special Master consequently also finds that Sussel was mistaken in his assumption that he was to be terminated from his position.

27. On January 7, 1985, Anderson and Kekuna appeared at the City's civil defense agency office and met with the employees thereof, including Sussel. RT 12/21/90 at 103:16-22.

28. The contents of a memorandum of that date from the Managing Director were made known to all those present. The memorandum provided that:

> The Mayor has temporarily named Mr. George Kekuna, one of his assistants, to assist the Managing Director to ensure the competent and efficient organization and operation of the City and County's Honolulu Civil Defense Agency.
>
> All employees will look for direction and guidance of this City agency from Mr. Kekuna at all times. Ex. 14.

29. Following the January 7, 1985, visit, Sussel had his attorney call a meeting with the Managing Director which was held on January 9, 1985, in the Managing Diretor's office. In attendance were the Managing Director, the Corporation Counsel,

the Civil Service Director. Also present were Sussel, his attorney, Mr. Charles Khim, and a Hawaii Government Employees Association ("HGEA") union representative, Mr. Keith Ahue. RT 1/3/91 at 98:15-23.

30. At the January 9, 1985, Sussel's representative expressed a concern that Sussel had been stripped of his duties and responsibilities, yet still was left with possible liability in the event any claims were brought against the Civil Defense Agency. Ex. 51.

31. This concern about possible liability was expressed by Sussel to his representatives before the January 9, 1985, meeting, at the time of the meeting, and after the meeting in a letter he sent to the Managing Director dated the following day, January 10, 1985. RT 12/14/90 at 166:24-168:10, Ex. 51, Ex. 24.

32. Sussel made much of his attorney having authored the letter and then presenting it to Sussel as a "fait accompli" with instruction to sign it. Nonetheless, the Special Master finds that Sussel signed the letter as his own, as he admitted at the hearing. Sussel did not point out anything of substance in the letter that he disagreed with. RT 1/15/91 at 158:4-160:10, 163:9-10.

33. Sussel also made a memorandum of the January 9, 1985, meeting, and it, too, made mention of the liability concern expressed at the meeting. Ex. 51.

34. The Corporation Counsel and the Civil Service Director readily recalled the concern about Sussel's personal liability being the central theme of the January 9, 1985, meeting. RT 12/18/90 at 221:20-222:12, 223:7-13, WDT 11/17/87 at 66:21-67:9.

35. Anderson also recalled that Sussel expressed concern that he, Sussel, might be held liable for actions taken in his job where he no longer had the same responsibilities. RT 12/13/90 at 185:3-186:1.

36. Mr. Ahue recalls that the issue regarding Sussel's liability was raised at the January 9, 1985, meeting and that even prior to the meeting, Sussel had expressed this concern that although his duties had been removed, he would still be liable for the actions of the agency. RT 12/14/90 at 166:24-168:10.

37. The only other party who attended the meeting was Sussel's attorney, but the Special Master notes that Sussel did not call his attorney to testify regarding the January 9, 1985, meeting and the issue of liability.

38. Sussel denied expressing fear of liability at the January 9, 1985, meeting and claimed that he never had any concern about liability. He, in fact, claimed that he *sought* responsibility and liability. RT 1/3/91 at 99:15-17; RT 1/15/91 at 95:4-14. In light of the contrary testimony of other persons at the meeting, including Sussel's own union representative, the Special Master finds that this expression is not credible.

39. After the January 9, 1985, meeting, the Managing Director, the Civil Service Director and the Corporation Counsel had discussions on how best to resolve the problems raised at the meeting. RT 12/18/90 at 225:17-226:11.

40. Both the Corporation Counsel and the Civil Service Director agreed that the only way to give Sussel the assurance that he would be free of the type of liability he had expressed concern about at the meeting was to change his job duties and responsibilities. RT 12/18/90 at 22:8-11.

41. The Corporation Counsel, Mr. Richard Wurdeman ("Wurdeman"), was an experienced city government attorney, having some ten years of combined service in both the Prosecuting Attorney's office, the Department of the Corporation Counsel and the City Council's staff. He served briefly as the Corporation Counsel in 1980. Wurdeman Deposition Transcript ("WDT") 11/17/87 at 7:7-8:19.

42. The Civil Service Director for the City and County of Honolulu, Mrs. Loretta K. Fukuda ("Fukuda"), had some 35 years of experience in public personnel administration with the State of Hawaii. RT 12/14/90 at 71:12-72:4.

43. In an attempt to resolve the dilemma of having Kekuna exercise supervision over the City's civil defense agency out of the Managing Director's office on the one hand, and satisfying Sussel's liability concern and avoiding litigation on the other, the Department of Civil Service began the process of reallocating Sussel's position downward whereby his duties

were described in a manner that would resolve his concern about liability as expressed by his representatives at the January 9, 1985, meeting. RT 12/18/90 at 153:10-22.

44. Meanwhile, after the January 9th meeting, but prior to January 21, 1985, Sussel was in and out of the City's civil defense agency office on vacation leave, or if he was in the office, he was busy moving his belongings from his former office to another adjacent private office at the agency. RT 1/3/91 at 49:11-25, 58:10-21.

45. On or about January 11, 1985, Sussel was asked to deliver the keys to the front door and executive toilet to Kekuna. He was also asked to turn in his pager and he was no longer required to respond to night emergencies. In addition, Sussel was informed that he would no longer act as the agency's spokesperson with the media. Ex. 31, RT 1/3/91 at 59:10-60:9.

46. Sussel's reallocation was effectuated on or about January 18, 1985. Ex. 33B, Ex. 34, Ex. 45. Sussel learned of his reallocation on January 21, 1985 when he returned to work from vacation leave. At that time, he received a copy of his new position description and his downward reallocation. RT 1/3/91 at 51:5-15.

47. Sussel then took leave commencing the afternoon of January 21, 1985, and did not return to work until almost one year later on January 2, 1986. RT 1/3/91 at 51:9-10, 61:17-62:9, 62:13-18, 63:2-11.

48. Kekuna had intended to utilize Sussel as Kekuna's "second in command," but because of Sussel's general unavailability and sporadic appearances at the office, Kekuna never had a chance to express that thought or to otherwise work with Sussel. RT 12/20/90 p.m. at 15:25-16:17, 40:16-41:10, 42:25-43:8.

49. Reallocation is a process which has been used by the City for more than thirty years. RT 12/11/90 at 107:15-23.

50. The rules adopted by the City's Civil Service Commission provide for reallocations, including reallocations downward. Rule 1.1-C.32,33.

51. Mr. Richard Takakawa, employed by the Department of Civil Service for the City and County of Honolulu for over thirty years, together with others on his staff, reviewed and processed all documents relative to Sussel's downward reallocation, as he does for all reallocations, in the ordinary course of his duties as the head of the Classification and Pay Division. RT 12/10/90 at 203:12-23, 215:23-216:8, 216:24-218:23, 219:16-220:15, 221:23-222:1, 223:8-226:17; RT 12/11/90 at 121:15-124:25, 133:4-134:3.

52. Sussel's downward reallocation was effected in a manner that preserved his salary of his former classification. This was done by a process known as temporary differential pay or, as commonly referred, "red circling." RT 12/19/90 at 77:22-79:24.

53. The downward reallocation was processed in one day because of the desire to promptly resolve the dilemma raised at the January 9, 1985, meeting. RT 12/18/90 at 228:20-229:2. Personnel actions, including downward reallocations, which are processed in one day are neither unusual nor uncommon. RT 12/11/90 at 133:4-11, 139:6-140:1.

54. A request to reallocate is normally initiated by the appointing authority. It then proceeds to the Budget Department and then to the Managing Director's office for signature and approval, then finally to the Director of Civil Service for her signature and approval. All this was done in Sussel's case. RT 12/14/90 at 96:19-98:9. There was some confusion in this instance as to when Anderson signed the request to reallocate since he served in two capacities as the Managing Director and the appointing authority. However, since all signatures necessary to effectuate the reallocation were obtained on the same day, the timing of Anderson's signatures in either capacity is of little consequence. Therefore, the Special Master finds that Sussel's reallocation was processed in the normal course through proper and standard civil service procedures.

55. The Special Master also finds that with the particular legal and civil service expertise and experience held by Fukuda and Wurdeman, that a good faith effort was made to find the

most appropriate method to resolve the dilemma and their intentions were not improper when the decision was made to reallocate Sussel.

56. Sussel contends that he was not downwardly reallocated, but that he was demoted, because he lost future pay and benefits and was stripped of supervisory authority.

57. This contention is not supported by the facts: Sussel did not lose any pay. Sussel was not taken out of Position CD 300 and placed in a lower position with lower pay. The change in his duties necessitated a reallocation of his position from Executive Assistant I, EM-07, to Administrative Assistant II, SR-21, but his position of CD 300 remained the same. RT 12/11/90 at 109:9-14; RT 12/19/90 at 186:23-198:10, 199:15-21; RT 12/20/90 a.m. at 30:13-28.

58. The EM pay track applicable to CD 300, Executive Assistant I, was higher than the SR pay track applicable to CD 300, Administrative Assistant II. By applying the temporary differential pay, Sussel maintained the same pay as Administrative Assistant II that he had as Executive Assistant I. RT 12/19/90 at 77:22-79:24.

59. All the expert witnesses agreed on the distinction provided in the civil service rules between a reallocation downward and a demotion. A reallocation downward involves the movement downward of a *position* while a demotion involves the movement of an *employee* to a lower class of pay. RT 12/17/90 at 82:19-20, 118:14-119:13, 120:5-14; Kunioka Deposition Transcript ("KDT") 9/7/88 at 133:12-24.

60. The Special Master finds that Mr. Wallace Kunioka's testimony equating of the two processes even after recognizing the aforementioned distinction is not credible and therefore, the Special Master rejects this view.

61. In arriving at his opinion that it is theoretically possible that a downward reallocation and demotion can be one and the same in a single instance if the downward reallocation involves a loss of pay or future benefits, Dr. Ronald Perry, Sussel's civil service expert, did not take into account *Gallas v.*

Sanchez, 48 Haw. 370 (1965), a Hawaii Supreme Court case which the Special Master feels would have affected Dr. Perry's opinion had he considered the case in arriving at his opinion. Therefore, the Special Master disregards this opinion.

62. The Special Master finds Sussel is currently still employed by the City and occupies Position CD 300, the same position he occupied before the Mayor took office.

63. Any Finding of Fact herein that should more properly be construed as a Conclusion of Law shall be deemed to be such.

64. Any of the following Conclusions of Law which should more properly be construed as a Finding of Fact shall be deemed to be such.

CONCLUSIONS OF LAW

From the foregoing facts, the Court makes the following conclusions of law:

1. The Mayor has the power to "exercise direct supervision" over any agency of the City, and through the Managing Director exercises supervision over all other executive agencies of the City. RCH §§ 5-103, 5-103(a).

2. The Mayor also has the authority to assign new duties and functions to departments of the executive branch, to coordinate all administrative activities, create or abolish positions and appoint a representative who shall, subject to the Mayor's direction, perform such duties as the Mayor may designate. RCH §§ 4-201, 5-103.

3. The Managing Director, pursuant to his Charter powers, has the authority to supervise the heads of all exeuctive departments and agencies assigned to the Managing Director, and such executive departments and agencies shall report directly to the Managing Director as principal administrative aide to the Mayor. RCH §§ 4-102, 6-102.

4. The Civil Defense Agency is an executive agency that is supervised by and reports directly to the Managing Director.

RCH §§ 4-102, 6-104. The Special Master concludes that pursuant to the powers and authorites above-mentioned, the Mayor was empowered and authorized to appoint Kekuna as Deputy Director-Designate of the Civil Defense in place of the Mayor to oversee the City's civil defense agency.

5. The findings show that when Kekuna was appointed as Deputy Director-Designate to oversee the City's civil defense agency and was operating out of the Managing Director's office, the City administration had no intention of displacing Sussel from his position at the Civil Defense Agency. Kekuna's appointment is separate and apart from the personnel action taken against Sussel and therefore, the motivation behind *Kekuna's* appointment is irrelevant to this appeal. Even if relevant, since Sussel was not removed to make room for Kekuna, Sussel's personnel action could not have been motivated by any political commitment owed to Kekuna by the Mayor or the Managing Director.

6. Moreover, the findings show that the Blue Ribbon Committee made their recommendatiions without any consideration of applicants' political affiliation, and therefore, there has been no showing that the Mayor's selection of Kekuna was in any way politically motivated.

7. There being no indication of political party preference in the selection process and no intention to hire Kekuna to replace Sussel, there is no evidence which tends to show that the personnel action affecting Sussel was motivated by politics. Therefore, the Special Master concludes, as a matter of law, that Sussel's reallocation was not motivated by politics.

8. The Director of Civil Service "shall be responsible for the . . . execution of the personnel program . . . and rules and regulations authorized by this charter. RCH § 6-305.2. The rules are to cover *inter alia*, "appointments, promotions, removals and other personnel matters . . . and position classifications. RCH § 6-311.2(a), (b).

9. All public officers are presumed to have discharged their duties faithfully, and to have complied with procedural requirements, in the absence of any evidence to the contrary. *Mitchell v. BWK Joint Venture*, 57 Haw. 535, 560 P.2d 1292 (1977). The findings show that all the civil service procedures necessary to effectuate a reallocation downward were complied with.

10. The Special Master therefore concludes that Position CD 300, Executive Assistant I, was duly reallocated downward to CD 300, Administrative Assistant II, in accordance with the Civil Service Rule 1.1-D.1.2-g, and Rule 1.1-E.6.1.

11. The reclassification of a position cannot be set aside unless it is clearly arbitrary, capricious or illegal. *Greenwald v. Schecter*, 17 Misc. 2d 611, 188 N.Y.S.2d 751 (1959). Having failed to produce any evidence that his reallocation was arbitrary, capricious or illegal, the Special Master concludes that Sussel's reallocation was lawful.

12. The findings show that the city administration did not attempt to reallocate Sussel until after the January 9, 1985, meeting wherein Sussel's representatives expressed Sussel's concern over his liability for actions of the agency when he no longer had the same responsibilities. Although Sussel denied expressing concern over liability, the facts are to the contrary and regardless, the Special Master concludes that Mr. Ahue, as Sussel's union representative, and Mr. Khim, as Sussel's attorney, acted as agents of Sussel with the authority to make binding statements on Sussel's behalf upon which city officials were entitled to rely. The Special Master also concludes that the reallocation was brought about as a direct result of the expressions of concern over liability at the January 9, 1985, meeting.

13. A demotion is the movement of an individual out of a position to another position with lower pay. Rule 1.1-C.10, Rules of the Civil Service Commission. The findings show that Sussel did not receive any less pay as a result of the personnel action since his salary was "red-circled," allowing him to receive

"temporary differential" pay to equal his salary before the reallocation. Therefore, the Special Master concludes that Sussel did not suffer any loss in pay as a result of the reallocation.

14. Additionally, civil service status is not a vested right and pensions or annuity benefits expectant upon such status are not vested property rights. *Gallas v. Sanchez*, 48 Haw. 370, 405 P.2d 772 (1965). One has no property right in an unearned salary. *Id.* Therefore, the Special Master concludes that Sussel has no vested right in any salary raises or retirement benefits that he *might* have received before the reallocation, and consequently has not suffered any loss of benefits in the form of salary raises or retirement benefits.

15. Therefore, since Sussel did not receive a cut in pay, nor was he entitled to any salary increases or retirement benefits that he might have received in his previous position before reallocation, the Special Master concludes, as a matter of law, that Sussel was not demoted.

16. Moreover, turning in his keys to the front door and the executive toilet, and no longer being spokesperson for the City's civil defense agency, or no longer being required to respond to night emergencies are all reasonable consequences of the reallocation of his duties and they do not constitute a demotion.

DATED: Honolulu, Hawaii, March 20, 1991.

/s/ Caron M. Inagaki
PAUL DEVENS
CARON M. INAGAKI
Attorneys for APPELLEES
except FRANK F. FASI

APPENDIX D

STAR-BULLETIN Wednesday, June 19, 1991 ■ A-5

Sussel outraged after being dealt a setback

By Jeanne Mariani, *Star-Bulletin*

Malcolm Sussel sat motionless as the city Civil Service Commission slapped down his appeal to be reinstated as head of the Oahu Civil Defense Agency.

Sussel, who says he was wrongfully ousted by Mayor Frank Fasi in 1985, has been in and out of court battling what he calls a political injustice.

His silence quickly turned to rage at the realization that his six-year saga will continue. He plans to appeal the commission's decision to Circuit Court.

Sussel, looking thin and visibly worn, said he and his family have received telephone death threats telling him to "lay off Mayor Fasi."

Commissioners may also be victims of that intimidation, Sussel said.

Fasi said Sussel's claim is totally false.

"I feel sorry for the man. He's mentally sick," Fasi said.

Sussel said he will not "lay off," and that he is prepared to go as far as the state Supreme Court.

"As long as I have a breath left in my body I will go on with this thing. I have a provision in my will that if I die my family will continue with this thing," he said.

> "*As long as I have a breath left in my body, I will go on with this thing. I have a provision in my will that if I die my family will continue with this thing.*"
>
> **Malcolm Sussel**
> Former director
> Honolulu Civil Defense Agency

The commissioners, who are appointed by Mayor Fasi and confirmed by the City Council, are in Fasi's political pocket, Sussel said.

"The mayor has broken the law, and nobody will stand up to him," Sussel said after yesterday's Civil Service Commission hearing.

Sussel said the mayor replaced him without cause and without the required 10-day notice, violating his rights as a civil

service employee. He was moved to a smaller office, had his agency car taken from him, and was told that George Kekuna would head the agency.

Although he drew the same pay, Sussel said his role with the Civil Defense Agency amounted to an "office boy."

> "*I feel sorry for the man. He's mentally sick.*"
>
> **Frank Fasi**
> Honolulu Mayor

But the mayor argued earlier that he had the right and the responsibility to choose who should lead the agency and best serve the city.

Fasi said earlier that Sussel had asked to be relieved of some of the liabilities associated with the job. He called the case "much to do about nothing."

"The ruling speaks for itself," Fasi said yesterday.

The commissioners refused to give reasons for their decision. Their reasons will be made public in a report during their next meeting on June 26, said commission Chairwoman Beverly Nagy.

The commissioners do not have to justify their votes at this time, Nagy said during the hearing.

Dennis King, Sussel's attorney, disagreed.

"All we heard today was a decision with no reasons why," King said. "I think it's extremely unusual that you won't publicly state the reasons for your decision, and it is important for the appearance of fairness in this trial."

Nagy and other commissioners refused, saying their individual decisions involved massive amounts of information and preparation.

"We are not going to submit to any questions in regard to our relationship with the mayor," Nagy said.

"You're going to have to wait until the next meeting," she told reporters after the meeting.

King said he will file an appeal for Sussel within 30 days after the commission issues its decision in writing.

Sussel had been on sick leave for more than a year until April 1990, when his leave ran out. He had been on leave without pay for a year after that before returning to work last April.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MALCOLM A. SUSSEL, *Plaintiff.* vs. CITY AND COUNTY OF HONOLULU, et al., *Defendants.*	) CIVIL NO. 86-01136 DAE

PARTIAL TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Tuesday, May 28, 1991, at 10:30 A.M., at Honolulu, Hawaii,

BEFORE:

HONORABLE DAVID A. EZRA,
U.S. District Judge.

APPEARANCES:

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determine whether I should exercise my discretion to remand them. So I don't know, exactly....

MR. KING: Well, Judge, I can see the dilemma. What I was going to propose this morning was something that could avoid the question at least temporarily.

The last order that was entered by the Ninth Circuit was on March 7th. We have until June 5th to file a petition for a writ of certiorari with the Supreme Court, and I have been authorized by my client to do that. That's next Wednesday. We'll be filing that petition.

We would ask that the question just be held in abeyance until the Supreme Court has ruled on the petition. Otherwise, if they were to grant it, and if the appeal to them was successful, we may have federal jurisdictional claims coming back here.

THE COURT: Mr. King, with all due respect to your client's desire to see this go to the Supreme Court, my candid opinion is that you don't have a likelihood of success in getting the United States Supreme Court to grant certiorari on Mr. Sussel's claims. There is nothing novel, No. 1; nothing particularly imperative for the nation as a whole, No. 2. It's much a fact driven set of circumstances. That was made clear in my opinion; that was made clear in the Ninth Circuit's opinion. This is not the kind of case that the United States Supreme Court takes on certiorari on

a regular basis. They turn down thousands of these every year.

I understand that Mr. Sussel has become, if you will, engrossed in this litigation; such that he feels, I'm sure, that his claims are such that the United States Supreme Court must determine them. But they must not determine anything, they have the discretion to determine those cases that they wish to determine; and this just does not appear to be the kind of case which I see the United States Supreme Court granting certiorari on.

MR. KING: I respect your opinion, Judge, but as an attorney for my client, I have an obligation.

THE COURT: Oh, no, I understand; absolutely.

Now, I am going to — I haven't heard from Mr. Devens and his position yet. I mean, what is your position on the merits of this?

Your motion to delay ruling on this is denied. This has dragged on for years, and the ambivalence of the Ninth Circuit with respect to this issue, and the final determination in the last paragraph of this opinion; they should have either reversed this Court or sustained the Court, in my view, on this issue.

To send it back here and to say: You have discretion to hear it or not to hear it. Well, I have already exercised that discretion; I heard it and decided

APPENDIX F

Revised Rules of the Civil Service Commission

1.1—A. RULES OF PRACTICE AND PROCEDURE

* * *

5.1 — STANDING TO APPEAL.

a. **Appeals from Disciplinary Actions.** Any regular employee who is reprimanded, suspended, dismissed or demoted may appeal to the Commission in accordance with Rule 11, Appeals and Hearings and Rule 15, Uniform Grievance Procedure, of the Civil Service Rules, except as otherwise provided by rule.

b. **Appeals from Action of Director or Appointing Authority.** As to any matter within the scope of Article VI, Chapter 3, Revised Charter of the City and County of Honolulu, any person suffering legal wrong or adversely affected or aggrieved because of any action by the Director or the appointing authority may appeal to the Commission, except that in the event such person is an employee, the appeal shall conform to procedures of Rule 11, Appeals and Hearings, or Rule 15, Uniform Grievance Procedure, of the Civil Service Rules as appropriate.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,	)	CA NOS. 89-15652
	)	89-15697
Plaintiff/	)	89-15777
Appellant/	)	89-15778
Cross-Appellee,	)	89-15779
vs.	)	89-15780
	)	
CITY AND COUNTY OF HONOLULU, et al.,	)	DC Nos. CV-86-1136-DAE
	)	CV-88-00375-DAE
	)	
Defendant/	)	For the District of Hawaii
Appellees,	)	
and	)	
	)	
FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu, et al.,	)	
	)	
Defendants/	)	
Appellees/	)	
Cross-Appellants.	)	
	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on appeal on Monday, April 9, 1990, commencing at 1:30 P.M., at the United States Courthouse, Prince Kuhio Federal Building, 300 Ala Moana Blvd., Honolulu, Hawaii 96850 pursuant to Notice.

BEFORE: The Honorable Harry Pregerson
The Honorable Jerome Farris
The Honorable Pamela Rymer

APPEARANCES:

For the Plaintiff/ Appellant/Cross-Appellee:	DENNIS W. KING, ESQ. WILLIAM J. DEELEY, ESQ. Suite 810, City Center 810 Richards Street Honolulu, Hawaii 96813
For the Defendants City and County of Honolulu, Jeremy Harris, Civil Service Commission of the City and County of Honolulu, Hiroo W. Miyagi, Ernest K. Dias, Moises L. Tacazon, Patricia K. Salsbury, Isabel M. Tagala and Beverly Nagy, in their respective official capacities:	PAULA DEVENS, ESQ. PAUL DEVENS, ESQ. Central Pacific Plaza Suite 1600 220 S. King Honolulu, Hawaii 96813
For the Defendant Frank F. Fasi:	STEVEN NAKASHIMA, ESQ. LORI AQUINO, ESQ. 1600 Bancorp 130 Merchant Street Honolulu, Hawaii 96813 and WILLIAM McCORRISTON, ESQ. Five Waterfront Plaza Suite 400 500 Ala Moana Blvd. Honolulu, Hawaii 96813
For Defendant D. G. "Andy" Anderson:	CYNTHIA H. THIELEN, ESQ. BOYCE R. BROWN, JR., ESQ. STANLEY LEVIN, ESQ. 345 Queen Street, Suite 700 Honolulu, Hawaii 96813
For Defendant George Kekuna:	GREGORY SATO, ESQ. Amfac Building, 15th Floor 700 Bishop Street Honolulu, Hawaii 96813

because he was not, twice, he has no cause of action.

MS. DEVENS: Yes.

JUDGE FARRIS: All right.

MS. DEVENS: And I would also —

JUDGE FARRIS: Mr. King probably is clear about — it was clearer that without the summary, but at least I hope he's clear now and he can respond.

MS. DEVENS: And that's why I think that the court's demotion finding, a footnote for it is dictum.

The court didn't give it a considered analysis. If you look at the rules that define what a demotion is and what downward rellaction is —

JUDGE FARRIS: Well, we know what the court did. The court relied on the testimony of a one person who said he was demoted. That's all the court did.

He didn't make a factual finding, he made a statement based on a statement made by a person who had, as Mr. King properly argued, stated that that's what happened. She was in a position to know so the judge took that as what happened. Isn't that pretty much what the record shows?

MS. DEVENS: Yes.

JUDGE FARRIS: I'm not trying to limit your argument, but do you have anything further?

MS. DEVENS: No, I think you're doing a fine job.

JUDGE FARRIS: A fine job of limiting you?

APPENDIX H

Hawaii Revised Statutes (1985 Replacement)

§91-9 Contested cases; notice; hearing; records. (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

(1) The date, time, place, and nature of hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;

(5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decisions, the record shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings and exceptions;
(5) Report of the officer who presided at the hearing;
(6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein.

* * *

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, trial de novo, including the right of trial by jury, provided by law.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607.5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order.